IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1484

JAMES ZURCHER, et al., *Petitioners,*

vs.

THE STANFORD DAILY, et al., *Respondents.*

No. 76-1600

LOUIS P. BERGNA, District Attorney, et al., *Petitioners,*

vs.

THE STANFORD DAILY, et al., *Respondents.*

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONERS BERGNA AND BROWN

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JAMES ZURCHER, Individually and as Chief of Police of the City of Palo Alto, County of Santa Clara, State of California, JIMMIE BONANDER, PAUL DEISINGER, DONALD MARTIN and RICHARD PEARDON, all Individually and as Police Officers of the City of Palo Alto, County of Santa Clara, State of California,
Petitioners,

vs.

THE STANFORD DAILY, FELICITY A. BARRINGER, FRED MANN, EDWARD H. KOHN, RICHARD LEE GREATHOUSE, ROBERT LITTERMAN, HALL DAILY and STEVEN G. UNGAR,
Respondents.

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ARGUMENT

I

RESPONDENTS' RETREAT FROM THE POSITION THEY SOUGHT AND OBTAINED IN THE LOWER COURTS IS NOT ENOUGH. THEY CONTINUE TO SEEK A NOVEL, ENCUMBERING RULE AND FAIL TO RECOGNIZE THAT THIS COURT'S RULES ADEQUATELY PROTECT FIRST AND FOURTH AMENDMENT INTERESTS.

In the lower courts respondents sought and obtained two new rules. The first ruling was that "law enforcement agencies cannot obtain a warrant to conduct a third party search unless the magistrate has probable cause to believe that a subpoena duces tecum is impractical." App. Pet. 26. The second was that in newspaper searches "a search warrant should be permitted only in the rare circumstances where there is a *clear showing* that (1) important materials will be destroyed or removed from the jurisdiction; *and* (2) a restraining order would be futile." App. Pet. 33. (Court's own emphasis.) Respondents now abandon the second rule.[1] In addition they propose to narrow the first rule, to apply to newspapers only[2] and even that rule would not apply to contraband, nor to the

[1]This retreat seems a clear acknowledgement that the lower courts' rulings are too broad to be defended in this Court. Yet these federal rulings were delivered without any consideration of the protections in California's search law and in partial reliance on a rationale (the supposed absence of a vicarious exclusionary rule) that is not applicable in a consideration of California law. Such actions make a mockery of the principles of comity. See Bergna Brief at 24-26.

[2]Respondents do make a brief alternative argument for yet another rule that would apply to all third parties. Respondents' Brief at 40. But this proposed rule is markedly different from the rulings obtained in the lower courts. See n.13, *infra*.

"fruits" or "instrumentalities" of crime but only to "mere evidence". Respondents' Brief at 11.[3]

Respondents' retreat is not enough. Even the new newspaper rule now proposed by respondents is proved unworkable by the facts of this case. Respondents must recognize that the established protections of the First and Fourth Amendments properly used will adequately protect the interests at stake in the rare newspaper search.[4]

[3]Respondents seek to revive the mere evidence distinction condemned by both scholars and the courts and finally interred by this Court in *Warden v. Hayden* (1967) 387 U.S. 294. If we follow respondents' present suggestion, all the difficulties and absurdities of the old "mere evidence" rule would return to haunt the courts. See *Traynor*, C.J.'s opinion in *People v. Thayer* (1965) 63 Cal.2d 635, 47 Cal.Rptr. 780.

[4]Respondents are mistaken when they assert that third party searches have been uniformly condemned. See *In re Search Warrant Issued Against Premises Of Simon, Etc.* (N.J. 1935) 177 A. 557; *People ex rel. Carey v. Covelli* (1975) 61 Ill.2d 394, 336 N.E.2d 759. See also *United States v. Jeffers* (1951) 342 U.S. 48, the clear implication of which is that a third party search pursuant to warrant is perfectly proper.

Three of the four cases that respondents cite on this point (Respondents' Brief at 43 n.23) were also cited by the Ninth Circuit and have already been shown inapposite in the briefs. Bergna Brief at 14 n.12; Zurcher Brief at 31 n.17. In the fourth case, *People v. Carver* (1939) 16 N.Y.S.2d 268, a district attorney had sought a "novel" order for seizure of corporation books then in the possession of another governmental agency. The King's County Court said that seizures must be by subpoena duces tecum, search warrant or incident to arrest, and implied in dictum that the state search warrant statute then in effect would not authorize seizure of the documentary evidence in question. Furthermore, the court even implied agreement with the district attorney's statement that the rights of third parties "are not as sacred as those of a defendant." 16 N.Y.S.2d at 271.

For another explicit rejection of the Ninth Circuit's rule see *State v. Tunnel Citgo Services* (1977) 149 N.J. Super. 427, 374 A.2d 32, 35.

A. Established Protections Ensure That Newspaper Searches Do Not Constitute A Threat To The Interests At Issue.

Respondents and media *amici* claim that the number of newspaper searches has reached a disturbing level. Respondents' Brief at 32, n.17; Media Brief at 11-13.[5] In fact, the number of press searches is small. Media *amici's* own statistics indicate a total of six press searches since 1971, i.e., an average of one search per year. Media Brief at 11. In *Branzburg v. Hayes* (1972) 408 U.S. 665, this Court rejected a constitutional newsman's privilege despite the assertion that "press subpoenas have multiplied." 408 U.S. at 699. Search warrants are, of course, much less common than subpoenas. This is in part because the law allows subpoenas to issue without a showing of probable cause to believe that premises contain evidence of a crime.[6] It is also because, as our district attorney *amici* point out, elected and appointed prosecutors will always hesitate to search any news organization for fear of "career-crushing" political and public backlash. Dist. Atty. Brief at 25. "[T]here is much force in the pragmatic view that the press has at its disposal powerful mechanisms of communication and

[5]This is a reference to the brief *amici curiae* filed in support of respondents and on behalf of The Reporters Committee For Freedom of The Press and other media organizations. The brief *amici curiae* filed in support of respondents and on behalf of the National Association of Criminal Defense Lawyers, Inc. is referred to hereinafter as Def. Attys. Brief. The brief *amici curiae* filed in support of petitioners and on behalf of The National District Attorneys Association and The California District Attorneys Association is referred to as Dist. Atty. Brief.

[6]*In re Blue Hen Country Network, Inc.* (Del. 1973) 314 A.2d 197, 201. See *Oklahoma Press Publishing Co. v. Walling* (1946) 327 U.S. 186.

is far from helpless to protect itself from harassment or substantial harm". *Branzburg* at 706.

Respondents claim that the threat of searches will deprive the press of numerous news sources, relying for their claim on the affidavits of several prominent journalists. Respondents' Brief at 19-22. It is unlikely that anyone will dispute the respectability of these journalists. It is also unlikely that any impartial person will fail to recognize the strong bias that these journalists have on the points to which they speak. Their allegations that news sources will be lost "are chiefly opinions of predicted informant behavior and must be viewed in the light of [their] professional self-interest . . . ." *Branzburg* at 694. It is clear that the journalists' opinions presented here are similarly too alarmist. Newspaper searches do not occur very often, and when they do, the rules established by this Court minimize their intrusiveness. Surely, not very many of the nation's news sources could have been frightened into silence by the fifteen minute search that occurred in our case.[7] The Stanford Daily certainly was not.

Media *amici* claim that the seizure of news documents or photographic materials may be so "large

[7]Media *amici* are wrong when they say there was "no opportunity for staff to locate and produce the requested photograph itself." Media Brief at 30. The police did ask for cooperation in producing the sought after photographs. They did not get it. A130-131.

We note that, aside from their concern that sources will be frightened away, respondents and their *media amici* also cite concerns of possible physical disruption, exposure of the editorial process, the jeopardizing of newspaper credibility, and the creation of self-censorship. These concerns are overstated for the same

scale" as to constitute a "wholesale obstruction to the circulation of information and ideas . . . ." Media Brief at 29.[8] There are at least two answers to this claim. First, the claim assumes, improperly we think, that an issuing magistrate will exceed his authority under *Heller v. New York* (1973) 413 U.S. 483.[9] Second, we do not have such facts in this case. We have a warrant that is narrow in scope.

Respondents argue that newspaper searches thwart state shield laws. Respondents' Brief at 28-30. This argument is of doubtful validity. Warrants issue only when there is probable cause to believe that the materials sought constitute evidence of a crime. Even the executive privilege of the President of the United States falls short of an absolute protection for this type of evidence.[10] In California, it is most doubtful that the statutory newsman's privilege would be interpreted as providing such a protection. See *Rosato v. Superior Court* (1975) 51 Cal.App.3d 190, 218, 124 Cal.Rptr. 427, 446, cert. den. 427 U.S. 912 stating that the shield law is inapplicable to a newsman witnessing

reasons as is the concern of diminution of sources. Just as the rule of scrupulous exactitude and the practical limits on press searches protect against unnecessary breaches of confidence,, so do these factors also minimize physical disruption, exposure of the editorial process, the jeopardizing of credibility, and the creation of self-censorship.

[8]This claim is part of the argument that judicial appraisal of First Amendment interests is inadequate because no adversary hearing is held before the warrant issues. That argument is answered by the cases cited in our discussion of the rule of scrupulous exactitude. See *Stanford v. Texas* (1965) 379 U.S. 476 and other cases cited in Bergna Brief at 20-22.

[9]See also *A Quantity of Books v. Kansas* (1964) 378 U.S. 205; *Marcus v. Search Warrant* (1961) 367 U.S. 717.

[10]*United States v. Nixon* (1974) 418 U.S. 683, 703-707.

a crime."[11] At any rate, the shield law argument is out of place here. If, in fact, the intent of a state's legislature were being frustrated by newspaper searches, we could assume that either that state's courts or that state's legislature would respond in a proper manner. Certainly the fact that newspaper searches raise an issue as to the interpretation of state shield laws is no justification for making every newspaper into a virtual constitutional sanctuary beyond state legislative control. Compare *Branzburg* at 697.

Respondents also claim that use of a warrant against a newspaper violates the principle that infringement of protected First Amendment rights must be no broader than necessary to achieve a "compelling" or "paramount" public interest. Respondents' Brief at 38-40.[12] A warrant issues only to achieve a compelling public interest, i.e., only when there is probable cause to believe that the materials sought constitute evidence, contraband, fruits, or instrumentalities of a crime. The rule of scrupulous exactitude applicable to warrants touching on First Amendment interests assures that the search is no broader than is necessary to serve the compelling interest, i.e., this rule assures that there can be no "prob[ing] at will and without relation to existing

[11]Respondents' sole authority for the proposition "the materials are now plainly protected by Section 1070 of the California Evidence Code" (Respondents' Brief at 49, n.26) is a law review note (28 Stan.L.Rev. 957, 989 (1976)) which fails to discuss the *Rosato* case.

[12]See e.g. *Freedman v. Maryland* (1965) 380 U.S. 51; *Near v. Minnesota* (1931) 283 U.S. 697, 722; *Branzburg* at 680-681, 699.

need." *DeGregory v. Attorney General of New Hampshire* (1966) 383 U.S. 825, 829. In short, the warrant is the best "least drastic means." Finally, as we show in our next argument, the facts of our own case demonstrate that the subpoena, offered by respondents as an even less drastic means, just does not accomplish the same ends as the warrant.

B. The Record Of This Case Demonstrates The Unworkable Nature Of The Novel Constitutional Principle Proposed By Respondents.

We think most newspapers are responsible. But respondents' position necessarily assumes that *all* newspapers must be presumed to have that special sort of responsibility that will provide an adequate resistance to the pressures to dispose of criminal evidence. (See Bergna Brief at 17-19). Thus respondents are upset that a portion of our statement of facts goes fairly strongly against their assumption. They accuse us of "an unsubtle attempt to cast doubt upon the integrity of the Daily and its staff." Respondents' Brief at 6, n.1. We do not mean to be subtle on this point. We mean to be explicit. That is why we again quote what the *Daily* in an editorial published *before* the search said it would do with criminal evidence:

> "Negatives which may be used to convict protesters will be destroyed . . . . The Daily feels no obligation to help in the prosecution of students for crimes related to political activity." A.118.

And we quote what the Daily in an editorial published *after* the search said of its attitude toward criminal evidence:

> "It has been the Daily's standing policy to destroy all potentially incriminating unpublished photographic material." A.119-120.

The plain meaning of the above policy statements, whether read separately or as a part of the editorials in which they appear, is that criminal evidence of the kind described will be routinely destroyed regardless of whether it is the object of a subpoena. Respondents both espoused and published this policy so as to obtain the trust of radical groups and thus obtain an inside track on the other media in the reporting and photographing of violent confrontations. A.133. They cannot be heard to complain of having been hoist by their own petard. Respondents totally reject the ancient and honorable duty of those protected by our laws to assist in upholding them at least to the extent of telling the truth about what they saw and heard, and modernly, photographed and recorded. We say this rejection is totally irresponsible.

Respondents' other complaint about our use of the above facts is that they are irrelevant. The relevance is this: These facts show that the news profession like the legal profession, the medical profession or any other profession has its irresponsible members. These facts show that the subpoena alternative could not have worked with the very members of the profession who now propose it; it would have not worked because these persons would have destroyed the criminal evidence.

Despite their convincing nature, these facts are characterized by respondents as insufficient to meet

their test of subpoena impracticality. Respondents' Brief at 5, n.1, 37, n.21. Amazingly, in dictum, the Federal District Court agreed. 353 Supp. at 135, n.16. If this is true it is difficult to envision any set of facts that might meet the old test. Even if we assume that these facts would justify the issuance of a warrant under the rule respondents presently propose, the new rule will not work in the usual case.[13] The Daily's publication of its evidence destruction policy is most unusual. In the usual case, fringe newspapers will not proclaim their intention to destroy evidence. Clear evidence of subpoena impracticality will not be available. A fringe newspaper—even perhaps a "sham" newspaper (*Branzburg* at 705 n.40)—then becomes a constitutional sanctuary; neutral and detached magistrates may not authorize the search of that newspaper even though they are shown evidence that clearly satisfies them of the existence of probable cause to believe the newspaper has convincing evidence not only of a felony, but also of the identity of the fugitive felons.

[13]The alternative rule which respondents advance for "non-suspects" generally suffers from the same unworkable nature as the rule advanced for non-suspect newspapers. This alternative rule would prevent the issuance of the "third-party" warrant despite the existence of traditional probable cause, where the warrant application affirmatively shows (1) absence of special relationship to the suspect, (2) special "status" of the third party, (3) grounds to resist compelled production, (4) particularly sensitive privacy interests, and (5) that a subpoena is not otherwise impractical. We are unsure of the meaning of several of these criteria but we have a clear complaint against the second. For the reasons we state a presumption of responsibility from status is unjustified.

We ask this Court to reject respondents' proposals.[14]

II

THE LEGISLATIVE HISTORY OF THE ACT DOES NOT SUPPORT RESPONDENTS' ARGUMENT THAT JUDGES AND PROSECUTORS ARE NOT IMMUNE FROM THE IMPOSITION OF ATTORNEYS' FEES.

The central thrust of respondents' brief is that the Attorneys' Fees act abrogates the common law immunities to fee awards and does not require a showing of "bad faith" as a condition of awarding fees. The foundation of this argument is that petitioners have ignored the legislative history and purpose of the Act.[15]

[14]We note that defense attorneys *amici* also propose a new rule for nonsuspects generally. This rule would require that the warrant application contain "sufficient facts for the magistrate to determine that the person for whom the authority to search is sought bears a relationship with a criminal suspect (not necessarily identified) which would suggest a manifest probability that the evidence will be destroyed, secreted or removed from the jurisdiction." Def. Attys. Brief at 10-11. Although amici say they do not mean their rule to incorporate the new probable cause requirements that the Ninth Circuit would add, there appears to be little practical difference between the *amici* proposal and the Ninth Circuit ruling. The proposal should be rejected for the reasons stated in our brief. Bergna Brief at 16-20.

[15]Respondents also contend that Congress intended that the Act apply retroactively and that petitioners "do not contend that application of the Act to pending cases is in some way unconstitutional." Respondents' Brief, 56. In fact, petitioners did assert that retroactive application of the Act would result in a denial of due process. Bergna Brief, at 27 n.20. In any event, the Act does not mandate the award of fees, but calls for an exercise of discretion. Such discretion includes the duty to determine if any special circumstances exist, which would render the award of attorneys' fees unjust. *Wharton v. Knefel* (8th Cir. 1977) 562 F.2d 550, 558; *Beazer v. New York City Transit Authority* (2nd Cir. 1977) 558 F.2d 97, 101.

We submit that respondents, not petitioners, have not only ignored the legislative history of the Act, but have also failed to come to grips with our primary contention. As stated in the Bergna Brief at 30, the Senate Report clearly suggests that an individual official will not be held personally responsible for the payment of attorneys' fees. A recent case from the Fifth Circuit concluded, *inter alia,* that ". . . the Attorney's Fees Award Act does not change judicially established rules governing immunity for unconstitutional acts committed by a person acting in official capacity." *Universal Amusement Co., Inc. v. Vance* (5th Cir. 1977) 559 F.2d 1286, 1301. There is therefore no doubt that a prosecutor who secures a search warrant is acting in his official capacity and is consequently immune from the imposition of attorneys' fees.

Respondents also fail to meet our argument that the Act does not explicitly overrule this Court's decisions that state and local government entities are not "persons" within the meaning of section 1983, and hence are not subject to the imposition of attorneys' fees. Bergna Brief, at 31-32. Understandably, respondents totally ignore the new proposed legislation, which by explicitly providing that governmental entities be parties, recognizes that the Act does not cover those parties. In an analogous context, it has been held that in the absence of explicit language subjecting the states to liability for damages and attorneys' fees, a state's immunity under the Eleventh Amendment would not be limited. *Skehan v. Board of*

Trustees of Bloomsburg State (M.D. Pa. 1977) 436 F.Supp. 657, 667.[16]

Finally, we do not agree that *Fitzpatrick v. Bitzer* (1976) 427 U.S. 445 refutes our contention that any Congressional attempt to abrogate the absolute immunity afforded judges, prosecutors and those who carry out judicial orders would exceed the permissible scope of the Fourteenth Amendment to the United States Constitution. This Court is not required to uphold any legislation simply because some members of Congress cite section 5 of the Fourteenth Amendment. In an area as sensitive as a state's criminal justice system, we submit that any attempt by Congress to interfere with the immunities of judges and prosecutors necessary to carry out their duties exceeds the scope of the Fourteenth Amendment. Imposition of attorneys' fees in section 1983 suits constitutes a significant and undue interference with the rights and duties of judges and prosecutors and should not be sanctioned by this Court.

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[16]As stated in the Bergna Brief, at 32-33, the fact that California has an indemnity statute does not confer jurisdiction in a case in which Congress has failed to do so.

CONCLUSION

We ask this Court to reverse the judgment of the Ninth Circuit.

Dated: January 10, 1977

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